APPENDIX

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 28, § 2255. FEDERAL CUSTODY; REMEDIES ON MOTION ATTACKING SENTENCE

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released

upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105.

TITLE 18, § 1503. INFLUENCING OR INJURING OFFICER, JUROR OR WITNESS GENERALLY

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence,

obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 769.

TITLE 18, § 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

RULE 35, FEDERAL RULES OF CRIMINAL PROCEDURE. CORRECTION OR REDUCTION OF SENTENCE

The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

INDICTMENT

The Grand Jury charges:

COUNT I.

1. That on or about March 22, 1960, one Kenneth Bruce Sheetz appeared as a witness before a grand jury duly empanelled and sworn by the United States District Court for the District of Nebraska, and gave testimony before such grand jury relating to certain violations of the laws of the United States by one Anthony J. Biase; that in so appearing and testifying before such grand jury, the said Kenneth Bruce Sheetz was a witness attending the United States District Court for the District of Nebraska.

2. That on or about March 22, 1960, the said grand jury for the District of Nebraska returned a true bill of indictment against the said Anthony J. Biase, charging him with the sale of certain narcotic drugs in violation of the laws of the United States.

3. That the said Kenneth Bruce Sheetz was and is a witness in the United States District Court for the District of Nebraska, in a matter pending therein, styled as United States of America versus Anthony J. Biase, No. CR.-0501.

4. That on or about June 20, 1960, at Kansas City, Missouri, in the Western Division of the Western District of Missouri, Anthony Cardarella and Felix Ferina wilfully, knowingly, unlawfully, feloniously and corruptly and by force did injure Kenneth Bruce Sheetz in his person on account of his having attended and having testified as a witness in the United States District Court for the District of Nebraska, as aforesaid, all in violation of 18 U.S.C. 1503.

COUNT II.

1. The Grand Jury re-alleges all of the allegations contained in paragraphs 1, 2 and 3 of Count I of this indictment, as fully as if set forth at length in this count.

2. That on or about June 20, 1960, at Kansas City, Missouri, in the Western Division of the Western District of Missouri, Anthony Cardareila and Felix Ferina wilfully, knowingly, unlawfully, feloniously and corruptly and by force did endeavor to influence, intimidate and impede Kenneth Bruce Sheetz, a witness in the United States District Court for the District of Nebraska, in a matter pending therein, styled as United States of America versus Anthony J. Biase, No. CR.-0501, in that the said Anthony Cardarella and Felix Ferina did injure the said Kenneth Bruce Sheetz in his person, all in violation of 18 U.S.C. 1503.

COUNT III.

1. The Grand Jury re-alleges all of the allegations contained in paragraphs 1, 2 and 3 of Count I of this indictment, as fully as if set forth at length in this count.

2. That from on or about April 1, 1960, to on or about April 30, 1960, at Kansas City, Missouri, in the Western Division of the Western District of Missouri, Carlton A. Young did wilfully, knowingly, unlawfully, feloniously and corruptly endeavor to influence, intimidate and impede the said Kenneth Bruce Sheetz, a witness in the United States District Court for the District of Nebraska, in a matter pending therein, styled as United States of America versus Anthony J. Biase, No. CR.-0501, in that the said Carlton A. Young did attempt to persuade and cause to be persuaded the said Kenneth Bruce Sheetz to refrain from testifying for, or otherwise cooperating with, the United States in the prosecution of said case, all in violation of 18 U.S.C 1503.

COUNT IV.

1. The Grand Jury re-alieges all of the allegations contained in paragraphs 1, 2 and 3 of Count I of this indictment, as fully as if set forth at length in this count.

2. That commencing on or about March 22, 1960, and continuing to the date of this indictment, in the Western Division of the Western District of Missouri, Anthony J. Biase, Anthony Cardarella, Felix Ferina and Carlton A. Young did unlawfully, wilfully, knowingly and feloniously combine, conspire, confederate and agree together and with each other and with others to this Grand Jury unknown, to defraud the United States of America and to commit offenses against the United States, to wit, to violate 18 U.S.C. 1503.

3. That it was a part of said conspiracy that the defendants would attempt to persuade, or cause to be persuaded, the said Kenneth Bruce Sheetz from testifying for, or otherwise cooperating with, the United States in the prosecution of the case styled as United States of America versus Anthony J. Biase, No. CR.-0501, pending in the United States District Court for the District of Nebraska, and to thereby influence, obstruct and impede the due administration of Justice.

4. That it was further a part of said conspiracy that the said Anthony Cardarella and Felix Ferina would injure and assassinate the said Kenneth Bruce Sheetz, on account of his having testified as a witness before the said Grand Jury of the United States District Court for the District of Nebraska, and to influence, intimidate and impede him as a witness in the trial in said court of the case of United States of America versus Anthony J. Biase, No. CR.-0501, and to thereby influence, obstruct and impede the due administration of justice.

OVERT ACTS

1. In furtherance of the aforesaid conspiracy and to effect the object thereof, in the Western Division of the Western District of Missouri, between the dates of April 1, 1960, and April 30, 1960, the said Carlton A. Young held various conversations with Mr. Kenneth Bruce Sheetz, relating to the testimony of, and availability of, Kenneth Bruce Sheetz as a witness in a matter pending in the United States District Court for the District of Nebraska, styled as United States of America versus Anthony J. Biase, No. CR.-0501.

2. In furtherance of the aforesaid conspiracy and to effect the object thereof, in the Western Division of the Western District of Missouri, on or about June 20, 1960, the defendants Anthony Cardarella and Felix Ferina did break open a door of the residence of the said Kenneth Bruce Sheetz at 4501 Michigan, Kansas City, Missouri, and did enter such residence.

3. In furtherance of the aforesaid conspiracy and to effect the object thereof, in the Western Division of the Western District of Missouri, on or about June 20, 1960, Anthony Cardarella, in the company of Felix Ferina, fired six shots from a .38 Special Caliber Revolver, with the intent and purpose of injuring and killing the said Kenneth Bruce Sheetz, all in violation of 18 U.S.C. 371.

A True Bill,

By .....,

Foreman.

Edward L. Scheufler,
United States Attorney,

J. Whitfield Moody,
Assistant United States Attorney,

O. J. Taylor,
Assistant United States Attorney.

JUDGMENT AND COMMITMENT

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 20732.

United States of America,

vs.

Felix Ferina.

(Vio: Secs. 1503 and 371, T. 18, U.S.C.)

On this 12th day of May, 1961, came the attorney for the government and the defendant appeared in person and by counsel. Upon arraignment on July 22, 1960, defendant entered a plea of not guilty to Counts 1, 2 and 4 of the Indictment herein, the only counts where he is charged.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty by a jury on April 21st, 1961, of the offenses of feloniously and corruptly and by force did injure, a person, on account of his having attended and having testified as a witness in the United States District Court, District of Nebraska, as charged in Count 1; and, did feloniously and corruptly and by force did endeavor to influence, intimidate and impede a witness in the United States District Court, District of Nebraska, in a matter pending therein, as charged in Count 2; and, did feloniously conspire and agree with others to defraud the United States and to commit an offense against the United States, as charged in Count 4, of the Indictment herein, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years on Counts 1 and 2, said sentences to be served concurrently with each other; and five (5) years on Count 4, to be served consecutively to the sentence imposed on Counts 1 and 2 for a total sentence of ten (10) years; without costs.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Approved as to form:

J. Whitfield Moody,
Assistant United States Attorney

The Court recommends commitment to: None recommended.

/s/ R. M. Duncan,
United States District Judge,

/s/ J. C. Truman,
Clerk.

A True Copy. Certified this 12th day of May, 1961.

/s/ J. C. Truman,
Clerk.

(By) /s/ D. D. Daniel, Jr.,
Deputy Clerk.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION.

UNITED STATES OF AMERICA, Plaintiff,
vs.
FELIX FERINA, ET AL., Defendants.
No. 20732

MOTION TO VACATE OR CORRECT ILLEGAL SENTENCE

COUNT I

Motion to Vacate or Correct Illegal Sentence under Title 28, Section 2255, U.S.C.A.

Comes now Felix Ferina, hereinafter referred to as petitioner in the above styled cause, in which the United States of America is named the respondent.

Pursuant to the provisions of Title 28, Section 2255, U.S.C.A., petitioner moves the Court to vacate and set aside the total sentence of ten years pronounced by this Court on Counts One, Two and Four of the indictment in case No. 20732 on May 12, 1961, for the following reasons as shown by the files, transcripts and records of this Court and exhibits to this Motion (*Morris* v. *United States*, 7 Cir., 311 F.2d 30; *Porter* v. *United States*, 5 Cir., 298 F.2d 461 (1)).

1. On November 14, 1960, an information was filed in the Circuit Court of Jackson County, Missouri, at Kansas City, in the case of State of Missouri v. Felix Ferina, No. C-30070, charging that petitioner did on June 20, 1960, make a felonious assault with malice aforethought with a

loaded pistol upon Kenneth Sheets with the intent to kill and slay the said Kenneth Sheets against the peace and dignity of the State (Ferina's Motion for Judgment of Acquittal herein, Exhibit A).

2. Attached to and made a part of this Motion at this place as Exhibit A is an affidavit of the Official Court Reporter of Division No. 5 of the Circuit Court of Jackson County, Missouri, at Kansas City, listing the witnesses in the State Court trial.

3. Upon a trial to a jury in said State Circuit Court, the jury returned a verdict of not guilty on the 17th day of December, 1960, and the Court entered a final judgment of acquittal of said charge on said date (Ferina's Motion for Judgment of Acquittal herein, Exhibit B).

4. Count I of the Indictment herein charged that on June 20, 1960, petitioner and others with feloniously and unlawfully by force injuring Kenneth Sheets in his person on account of his having testified as a witness in the United State Court in Nebraska in the prosecution of one Anthony J. Biase.

Count II of said Indictment charged petitioner and others did on June 20, 1960, feloniously and unlawfully by force endeavor to influence, intimidate and impede Kenneth Bruce Sheets, a witness in the Biase case then pending in the United States District Court in Nebraska by injuring said Sheets in his person.

Count IV of said Indictment charged that petitioner and others conspired and confederated together to persuade or prevent Sheets from testifying as a witness in the Biase case then pending in the United States Court in Nebraska or injury and assassinate him because of his having been a witness in said Biase case in the United States Court in Nebraska.

(a) The first overt act alleged was conversations of one Carlton A. Young with Sheets between April 1, 1960 and April 30, 1960, relating to the availability of Sheets as a witness in the Biase case in Nebraska. At the close of the Government's case the motion of Young for acquittal was sustained (Tr. 304, 463). This testimony was not connected with the other defendants and the testimony pertaining thereto was stricken upon motion of the defendants (Tr. 87-97, 303, 304, 463, 464, 465).

(b) The second overt act alleged was that Cardarella and petitioner broke open a door in the Sheets' residence. There was no evidence tending to prove Cardarella or Ferina broke open Sheets' door (Tr. 253, 284-291).

(c) The third overt act alleged was that on June 20, 1960, Cardarella in the company of Ferina fired six shots from a .38 caliber revolver with the intent and purpose of injuring and killing Sheets. This was the only overt act submitted (Tr. 448, 454, 462, 272) and is identical to the charge of which Ferina was acquitted in the State Court, Par. 1, supra.

Upon arraignment, petitioner entered pleas of not guilty to Counts I, II and III of the Indictment (Judgment, May 12, 1961).

5. Upon the trial in this Court, the jury on April 21, 1961, returned a verdict against petitioner of guilty on Counts I, [illegible] IV of said Indictment (Tr. 494, 495).

6. On the 12th day of May, 1961, the Court overruled and denied petitioner's Motion for Judgment of Acquittal or for a New Trial.

7. On May 12, 1961, the Court entered judgment on the verdict of the jury adjudging petitioner guilty as charged on Counts I, II and IV, and sentenced him to "imprisonment for a period of five (5) years on Counts 1 and

2, said sentence to be served concurrently with each other; and five (5) years on Count 4, to be served consecutively with the sentence imposed on Counts 1 and 2, for a total sentence of ten (10) years; without costs."

8. Thereafter petitioner appealed from said judgment and sentence to the United States Court of Appeals for the Eighth Circuit, which Court affirmed said judgment. *Felix Ferina* v. *United States of America*, No. 16,783; 302 P.2d 95. Petitioner then applied to the Supreme Court of the United States for a writ of certiorari which was denied on October 8, 1962. *Cardarella et al.* v. *United States*, No. 203; 371 U.S. 819; 83 S. Ct. 35.

9. Petitioner was committed to the United States Penitentiary at Leavenworth, Kansas, on the 24th day of May, 1962, where he is now confined. It is petitioner's contention that by reason of his acquittal on the same charge in the State Court he is entitled to complete release from imprisonment on the grounds of double jeopardy, res judicata, collateral estoppel and deprivation of his constitutional rights guaranteed him under the Fifth and Fourteenth Amendments to the Constitution of the United States (*Heflin* v. *United States*, 358 U.S. 415, 418; 79 S. Ct. 451, 453).

10. Petitioner challenged the jurisdiction of this Court to try him in this proceeding on the same charge he had previously stood trial and been acquitted in the State Court (Ferina's Motion for Judgment of Acquittal or New Trial, Exhibits A and B; Tr. 475) on the ground it subjected him to double jeopardy in violation of rights guaranteed him under the Fifth and Fourteenth Amendments to the Constitution of the United States (Ferina's Motion for Judgment of Acquittal, Arrest of Judgment or in the Alternative for a New Trial, p. 3-4, par. 19 and 22).

The Court overruled and denied such challenge to its jurisdiction and judgment.

11. Title 28, U.S.C.A., Section 2255, authorizes the relief prayed by petitioner herein.

In the case of *Johnston* v. *United States*, 8 Cir., 254 F.2d 239, the Court said (l.c. 241):

> "[5] A motion to vacate judgment under Title 28 U.S.C.A., § 2255, must challenge the jurisdiction of the court, or must charge that the sentence was imposed in violation of the Constitution or laws of the United States, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack. Lipscomb v. United States, 8 Cir., 226 F.2d 812, certiorari denied 350 U.S. 971, 76 S. Ct. 445, 100 L. Ed. 843, rehearing denied 350 U.S. 1003, 76 S. Ct. 550, 100 L. Ed. 866; Johnson v. United States, 5 Cir., 213 F.2d 492; Bloombaum v. United States, 4 Cir., 211 F.2d 944."

See to like effect: *Hill* v. *United States*, 368 U.S. 424, 426-427, 82 S. Ct. 468, 470; *Lewis* v. *United States*, D.C., Ct. App., 294 F.2d 209, 211 (4).

In the case of *United States* v. *Sobell*, 2 Cir., 314 F.2d 314, the Court said (l.c. 322)

> "Applying the standards limned in that and other opinions of the Supreme Court as best we can, we shall assume *arguendo*—in all likelihood too favorably for appellant, and without qualifications which may well be needed in other factual settings—that he should have relief under § 2255 if he has shown (1) a significant denial of a constitutional right, even though he could have raised the point on appeal and there was no sufficient reason for not doing so, 332 U.S. at 178-179 and fn. 8, 182, 67 S. Ct. 1590-1591 and 1592; see also United States v. Rosenberg, 200 F.2d 666, 671 (2 Cir., 1952), cert. denied 345 U.S. 965, 73

S. Ct. 949, 97 L. Ed. 1384 (1953); United States v. Allocco, 305 F.2d 704, 707 fn. 8 (2 Cir., 1962); or (2) a defect seriously affecting his trial, even though not of constitutional magnitude, if it was not correctible on appeal or there were 'exceptional circumstances' excusing the failure to appeal, 332 U.S. at 180-181, 184, 67 S. Ct. at 1592, 1593; see also Bowen v. Johnston, 306 U.S. 19, 26-28, 59 S. Ct. 442, 83 L. Ed. 455 (1939); Jordan v. United States District Court of District of Columbia, 352 U.S. 904, 77 S. Ct. 151, 1 L. Ed. 2d 114 (1956), reversing per curiam 98 U.S. App. D.C. 160, 233 F.2d 362, 367-369 (1956); Hill v. United States, supra, 368 U.S. at 428, 82 S. Ct. at 471."

However, denomination of this motion as based on Title 28 U.S.C.A. Section 2255 does not limit permissible relief herein to that authorized under said statute. *Hill* v. *United States,* 368 U.S. 424, 430, 82 Sup. Ct. 468, 472. Petitioner is entitled to any relief the record shows he is entitled to regardless of the denomination given the remedy invoked.

12. Petitioner is entitled to relief under Title 28 U.S.C.A. Section 2255, for the following reasons:

In the case of *Commonwealth of Pennsylvania* v. *Nelson,* 350 U.S. 497, 509-510, 76 Sup. Ct. 477, in holding the field of litigation there involved exclusively occupied by the federal government and denying concurrent jurisdiction to the state, the Court said (l.c. 484);

"[7] We are not unmindful of the risk of compounding punishments which would be created by finding concurrent state power. In our view of the case, we do not reach the question whether double or multiple punishment for the same overt acts directed against the United States has constitutional sanction. Without compelling indication to the contrary, we will not assume that Congress in-

tended to permit the possibility of double punishment. Cf. Houston v. Moore, 5 Wheat. 1, 31, 75, 5 L. Ed. 19; Jerome v. United States, 318 U.S. 101, 105, 63 S. Ct. 483, 486, 87 L. Ed. 640."

In the case of *Green* v. *United States*, 355 U.S. 184, 187-188, 78 S. Ct. 221, the Court stated the law as follows (l.c. 223):

"[1, 2] The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. In his Commentaries, which greatly influenced the generation that adopted the Constitution, Blackstone recorded:

'* * * the plea of *auterfoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence.'

Substantially the same view was taken by this Court in *Ex parte Lange*, 18 Wall. 163, at page 169, 21 L. Ed. 872:

'The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.'

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

"[3] In accordance with this philosophy it has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and even when 'not followed by any judgment, is a bar to a subsequent prosecution for the same offense.' United States v. Ball, 163 U.S. 662, 671, 16 S. Ct. 1192, 1195, 41 L. Ed. 300. Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous."

Under some circumstances double jeopardy arising out of two prosecutions in the state courts for the same offense may violate a defendant's rights under the Fourteenth Amendment to the Constitution of the United States.

In the case of *Hoag* v. *State of New Jersey*, 356 U.S. 464, 467-469, 78 S. Ct. 829, the Court said (l.c. 832):

"[3-6] We do not think that the Fourteenth Amendment always forbids States to prosecute different offenses at consecutive trials even though they arise out of the same occurrence. The question in any given case is whether such a course has led to fundamental unfairness."

(l.c. 833:)

"In the last analysis, a determination whether an impermissible use of multiple trials has taken place cannot be based on any overall formula. Here, as elsewhere, 'The pattern of due process in picked out in the facts and circumstances of each case.' Brock v. State of North Carolina, 344 U.S. 424, 427-428, 73 S. Ct. 349, 350-351, 97 L. Ed. 456. And thus, without speculating as to hypothetical situations in which the Fourteenth Amendment might prohibit consecutive prosecutions of multiple offenses, we reach the conclusion that the petitioner in this case was not deprived of due process."

We submit the true and correct construction of Constitutional protection against double jeopardy is stated in the dissenting opinion of Mr. Jusice Douglas (concurred in by Mr. Justice Black) as follows (356 U.S., l.c. 477, 78 S. Ct., l.c. 837):

> "We recently stated in Green v. United States, 355 U.S. 184, 190, 78 S. Ct. 221, 225, 2 L. Ed. 2d 199, that by virtue of the constitutional protection against double jeopardy an accused can be forced to 'run the gantlet' but once on a charge. That case, involving a federal prosecution, provides for me the standard for every state prosecution as well, and by that standard this judgment of conviction should be reversed."

Again in *Gore* v. *United States*, 357 U.S. 386, 396, 78 S. Ct. 1280, in a dissenting opinion, concurred in by Mr. Justice Black, Mr. Justice Douglas said (l.c. 1286):

> "Once a crucial issue is litigated in a criminal case that issue may not be the basis of another prosecution. Here the same sale is made to do service for three prosecutions. The different evidence test, which was adopted without much analysis by the Court in Carter v. McClaughry, 183 U.S. 365, 394-395, 22 S. Ct. 181, 192-193, 46 L. Ed. 236 (cf. Ex parte Nielsen, 131 U.S. 176, 9 S. Ct. 672, 33 L. Ed. 118), would permit the practice. Yet I agree with Bishop: '* * * in principle, and by the better judicial view, while the legislature may pronounce as many combinations of things as it pleases criminal, resulting not unfrequently in a plurality of crimes in one transaction or even in one act, for any one of which there may be a conviction without regard to the others, it is, in the language of Cockburn, C.J., "a fundamental rule of law that out of the same facts a series of charges shall not be preferred".' 1 Criminal Law (9th ed. 1923), § 1060. I think it is time that the Double Jeopardy Clause was liberally construed in light of its great historic purpose to protect the citizen from more than one trial for the same act."

In the case of *Bartkus* v. *People of State of Illinois*, 359 U.S. 121, 150, 79 S. Ct. 676, Mr. Justice Black in a dissenting opinion concurred in by the Chief Justice and Mr. Justice Douglas said (l.c. 695).

> "The Court's holding further limits our already weakened constitutional guarantees against double prosecutions. United States v. Lanza, 260 U.S. 377, 43 S. Ct. 141, 67 L. Ed. 314, decided in 1922, allowed federal conviction and punishment of a man who had been previously convicted and punished for the identical acts by one of our States. Today, for the first time in its history, this Court upholds the state conviction of a defendant who had been *acquitted* of the same offense in the federal courts. I would hold that a federal trial following either state acquittal or conviction is barred by the Double Jeopardy Clause of the Fifth Amendment. Abbate v. United States, 359 U.S. 187, 79 S. Ct. 666 (dissenting opinion). And, quite apart from whether that clause is as fully binding on the States as it is on the Federal Government, see Adamson v. People of State of California, 332 U.S. 46, 68, 67 S. Ct. 1672, 1684, 91 L. Ed. 1903 (dissenting opinion), I would hold that Bartkus' conviction cannot stand. For I think double prosecutions for the same offense are so contrary to the spirit of our free country that they violate even the prevailing view of the Fourteenth Amendment, expressed in Palko v. Connecticut, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288."

The State Court trial at which petitioner was acquitted was prosecuted largely upon investigations of federal authorities, as here, and dominated by federal officers and witnesses. It was in reality a federal prosecution in the State Court. (Exhibit A hereto)

In the *Bartkus* case, Mr. Justice Brennan in a dissenting opinion, concurred in by the Chief Justice and Mr. Justice Douglas, said (79 Sup. Ct., l.c. 703):

"I think that the record before us shows that the extent of participation of the federal authorities here constituted this state prosecution actually a second federal prosecution of Bartkus."

(l.c. 704:)

"Our task is to determine how much the federal authorities must participate in a state prosecution before it so infects the conviction that we must set it aside. The test, I submit, must be fashioned to secure the fundamental protection of the Fifth Amendment 'that the [Federal Government] with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity * * *.' Green v. United States, 355 U.S. 184, 187, 78 S. Ct. 221, 223, 2 L. Ed. 2d 199. Under any test based upon these principles, this conviction cannot stand. In allowing the use of federal resources to bring about this second try at Bartkus, the Court denies Bartkus the protection which the Fifth Amendment assures him. Given the fact that there must always be state officials involved in a state prosecution, I cannot see how there can be more complete federal participation in a state prosecution than there was in this case. I see no escape from the conclusion that this particular state trial was in actuality a second federal prosecution—a second federal try at Bartkus in the guise of a state prosecution. If this state conviction is not overturned, then, as a practical matter, there will be no restraints on the use of state machinery by federal officers to bring what is in effect a second federal prosecution."

The following federal agents and employees testified for the prosecution in both the State Court and Federal Court: Bernard A. Theisen, Jr., Agent, Federal Bureau of Narcotics (Exhibit A, # 12; Tr. 3-40); Claude A. Follmer,

Federal Agent, Bureau of Narcotics (Exhibit A, # 7; Tr. 267-275) and Morris Samuel Clark, Special Agent Federal Bureau of Investigation Laboratory (Exhibit A, # 8; Tr. 284-292).

The following other witnesses testified for the prosecution in both the State Court and Federal Court: Robert W. Sanders (Exhibit A, # 1; Tr. 205-214); Milton Roscoe, Jr. (Exhibit A, # 3; Tr. 222-228); Harry B. Hicks (Exhibit A, # 5; Tr. 233-246) and Patrick J. Allegri (Exhibit A, # 6; Tr. 275-284).

In addition to the above witnesses, Kenneth Bruce Sheets (Exhibit A, # 11; Tr. 99-182) testified for the prosecution at both trials. In September, 1959, Sheets was arrested for the purchase of narcotics (Tr. 101, 157, 158). He thereafter traveled with narcotic agent Theisen as a stool pigeon in the service of the Federal Bureau of Narcotics and later pleaded guilty to the sale of narcotics as charged (Tr. 105), but at the time of trial he had not been sentenced and was not incarcerated (Tr. 105) but was in protective custody of and under control and dominance of the federal authorities (Tr. 99, 161).

The State Court trial, we contend, was actually a federal prosecution and comes squarely within the condemnation of the opinion of the dissenting justices in the *Barktus* case, *supra*.

In the case of *Abbate* v. *United States*, 359 U.S. 187, 203, 79 S. Ct. 666, Mr. Justice Black in a dissenting opinion, concurred in by the Chief Justice and Mr. Justice Douglas, said (l.c. 675):

> "I am also not convinced that a State and the Nation can be considered two wholly separate sovereignties for the purpose of allowing them to do to-

gether what, generally, neither can do separately. In the first place, I cannot conceive that our States are more distinct from the Federal Government than are foreign nations from each other. And it has been recognized that most free countries have accepted a prior conviction elsewhere as a bar to a second trial in their jurisdiction. In the second place, I believe the Bill of Rights' safeguard against double jeopardy was intended to establish a broad national policy against federal courts trying or punishing a man a second time after acquittal or conviction in any court. It is just as much an affront to human dignity and just as dangerous to human freedom for a man to be punished twice for the same offense, once by a State and once by the United States, as it would be for one of these two Governments to throw him in prison twice for the offense."

In the case of *Parr* v. *United States*, 363 U.S. 370, 393, 80 S. Ct. 1171, the Court found the evidence did not sustain the substantive Count I and held as a consequence thereof that Count 20 charging conspiracy to commit the alleged crime which was the subject of Count I must also fail. The Court there said (l.c. 1184):

"[16] Inasmuch as the twentieth count charged petitioners with conspiring to commit the offense complained of in Count 1, and inasmuch as, on the facts of this record, that count cannot be sustained, it follows that petitioners' convictions upon the twentieth count cannot stand."

The only alleged overt act alleged in the conspiracy Count IV of which there was any evidence and the only one submitted was that on June 20, 1961, Cardarella in the company of Ferina fired six shots from a .38 caliber revolver with the intent and purpose of killing Sheets. This was the same charge petitioner was acquitted of in the State Court. In the case of *Sealfon* v. *United States*, 332 U.S. 575,

576, 579-580, 68 S. Ct. 237, the issue, involving federal prosecutions, was whether an acquittal on a conspiracy charge precludes subsequent prosecution for the substantive offense involved in the conspiracy charge. The Court, in holding acquittal on the conspiracy charge did preclude subsequent prosecution on the substantive charge, there said (l.c. 238):

> "This case presents the question whether an acquittal of conspiracy to defraud the United States precludes a subsequent prosecution for commission of the substantive offense, on the particular facts here involved."

(l.c. 240:)

> "Petitioner was the only one on trial under the conspiracy indictment. There was no evidence to connect him directly with anyone other than Greenberg. Only if an agreement with at least Greenberg was inferred by the jury could petitioner be convicted. And in the only instruction keyed to the particular facts of the case the jury was told that petitioner must be acquitted if there was reasonable doubt that he conspired with Greenberg. Nowhere was the jury told that to return a verdict of guilty it must be found that petitioner was a party to a conspiracy involving not only Greenberg but the Baron Corporation as well. Viewed in this setting, the verdict is a determination that petitioner, who concededly wrote and sent the letter, did not do so pursuant to an agreement with Greenberg to defraud.
>
> "[5] So interpreted, the earlier verdict precludes a later conviction of the substantive offense. The basic facts in each trial were identical. As we read the records of the two trials, petitioner could be convicted of either offense only on proof that he wrote the letter pursuant to an agreement with Greenberg. Under the evidence introduced, petitioner could have aided and abetted Greenberg in no other way. Indeed, respondent does not urge that he could. Thus the core of the

> prosecutor's case was in each case the same: the letter, and the circumstances surrounding it and to be inferred from it, and the false invoices. There was, of course, additional evidence on the second trial adding detail to the circumstances leading up to the alleged agreement, petitioner's participation therein, and what he may have got out of it. But at most this evidence only made it more likely that petitioner had entered into the corrupt agreement. It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent. That the prosecution may not do."

Here the petitioner was acquitted of the substantive charge in the State Court which should preclude this subsequent prosecution for conspiring to commit an act it has already been adjudicated he did not do.

If acquittal of a charge of conspiracy precludes subsequent prosecution for the substantive offense alleged then, we submit, it follows that acquittal of the substantive offense, as here, must necessarily also preclude subsequent prosecution for conspiracy to commit the alleged overt act.

In the case of *Herman* v. *United States,* 5 Cir., 289 F.2d 362, the Court so declared the law, saying (l.c. 368):

> "Similarly, where the substantive offense is the overt act supporting conviction on the conspiracy count, an acquittal of the substantive offense operates as an acquittal of the conspiracy count, if the acquittal of the substantive offense constitutes a determination that the overt act was not committed. In re Johnston, 3 Cal. 2d 32, 43 P.2d 541; Oliver v. Superior Court, 92 Cal. App. 94, 267 P. 764."

See to like effect: *United States* v. *Marakar,* 3 Cir., 300 F.2d 573, reversed *Marakar* v. *United States,* 370 U.S. 723, 82 S. Ct. 1573 (2).

The substantive offense of assault on Sheets with intent to kill was the overt act relied upon to support the conviction on the charge of conspiracy. The acquittal in the State Court determined no such overt act was committed necessarily operated as an acquittal of the conspiracy charge.

Counts I, II and IV herein constitute only one crime as only one overt act is the basis for all counts. See *Parr* v. *United States, supra; Sealfon* v. *United States, supra; Herman* v. *United States, supra.*

Under the doctrine of collateral estoppel the doctrine of res judicata should be extended to bar the subsequent prosecution in this Court both as to the substantive charges and the conspiracy charge.

In the case of *United States* v. *Kramer,* 2 Cir., 289 F.2d 909, in applying the doctrine of collateral estoppel, the Court said (l.c. 916):

> "More important, to permit the Government to force a defendant who has won an acquittal to relitigate the identical question on a further charge arising out of the same course of conduct, selected by the Government from the extensive catalogue of crimes furnished it in the Criminal Code, would permit the very abuses that led English judges to develop the rule against double jeopardy long before it was enshrined in the Fifth Amendment, 3 Holdsworth, History of English Law, 614—and still longer before the proliferation of statutory offenses deprived it of so much of its effect. See Mr. Justice Brennan's separate opinion in Abbate v. United States, 1959, 359 U.S. 187, 196, 201, 79 S. Ct. 666, 3 L. Ed. 2d 729. The very nub of collateral estoppel is to extend *res judicata* beyond those cases where the prior judgment is a complete bar. The Government is free, within the limits set by the Fifth Amendment, see United States v. Sabella, 2 Cir., 1959, 272 F.2d 206, 211, to charge an acquitted defendant with other crimes

claimed to arise from the same or related conduct; but it may not prove the new charge by asserting facts necessarily determined against it on the first trial, no matter how unreasonable the Government may consider that determination to be."

(l.c. 919:)

"The problem with respect to the first two conspiracy counts is, in a sense, the converse of Sealfon v. United States, supra. There the acquittal for conspiracy came first, here the acquittal on substantive charges. Recognizing that, in theory, an acquittal of conspiracy, which demands proof of agreement, is not inconsistent with conviction on a substantive charge, which does not, 332 U.S. at page 578, 68 S. Ct. at page 239, the Supreme Court nevertheless held that, on the facts in Sealfon, 'the earlier verdict precludes a later conviction of the substantive offense,' 332 U.S. at page 580, 68 S. Ct. at page 240, since 'the core of the prosecutor's case was in each case the same.'"

See also in this connection: *Sealfon* v. *United States*, 332 U.S. 575, 580, 68 S. Ct. 227, 240; *Yates* v. *United States*, 354 U.S. 298, 335, 336, 77 S. Ct. 1064, 1085, 1086.

While it is generally held the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses, res judicata may be a defense to a second prosecution. *Sealfon* v. *United States*, 332 U.S. 575, 578, 68 S. Ct. 237, 239 (1, 2).

In the case of *Adams* v. *United States*, 5 Cir., 287 F.2d 701, the Court said (l.c. 704):

"A second attempt to 'prove the agreement which at each trial was crucial to the prosecution's case' is a thing, the Court holds, which 'the prosecution may not do.' 332 U.S. at page 580, 68 S. Ct. at page 240.

"Following Sealfon this Court in Yawn v. United States, 5 Cir., 1957, 244 F.2d 235, was presented with

a similar set of circumstances. The defendant was first acquitted on a substantive offense, possession of a still. An indictment was brought one week later in which possession of the very same still at the very same time was alleged as one of the specific overt acts of a conspiracy to violate the federal liquor laws. We held the question of possession of the identical still to have been conclusively decided in the first trial and therefore the defendant's commission of this act could not properly be used as an overt 'act to effect the object of the conspiracy.' 18 U.S.C.A. § 371. The case was remanded for retrial on the conspiracy charge without the use of the evidence on possession of the still.

"[2, 3] Both of these cases deal with circumstances in which it was possible for a court to ascertain that the fact issue crucial to the second prosecution was 'necessarily determined' in the earlier trial. It was 'necessarily determined' on the first trial because it was there likewise crucial to the Government's case. When this is the situation it is clear that the fact issue may not be relitigated."

The alleged assault with intent to kill, of which petitioner was acquitted in the State Court, was here clearly crucial to the prosecution and under the above decisions condemns the judgment here as calling for double jeopardy and multiple punishments and calls for petitioner's discharge. It was a crucial element of the proof of both cases that petitioner did not act alone but acted jointly with Anthony Cardarella.

It is petitioner's contention as specifically set out at pages 4-7 of Count II of this Motion, which is incorporated here by reference, that the sentences herein inflict upon him double punishment for one offense. The law on this subject is well stated in the case of *Velasquez* v. *United States*, 10 Cir., 244 F.2d 416, as follows (l.c. 419):

"[4] The question of double punishment is presented. The substance of the argument is that the first and second counts of the indictment were predicated upon a single transaction, and that the imposition of separate sentences upon the two counts with provision that the sentences should run consecutively amounted to double punishment for a single offense. The accepted test to be applied in determining the identity of offenses charged in two or more indictments or in two or more counts in a single indictment is whether the same evidence is required to establish the several indictments or the several counts. If so, there is identity of offenses. But if each indictment or each count requires proof of a fact or element not required by the others, the charges are separate. Gavieres v. United States, 220 U.S. 338, 31 S. Ct. 421, 55 L. Ed. 489; Morgan v. Devine, 237 U.S. 632, 35 S. Ct. 712, 59 L. Ed. 1153; Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306; Pereira v. United States, 347 U.S. 1, 74 S. Ct. 358, 98 L. Ed. 435; Mills v. Aderhold, 10 Cir., 110 F.2d 765; Beacham v. United States, 10 Cir., 218 F.2d 528."

It would appear that on this record the only additional fact which might be required to prove Count IV was the participation of Biase. But that is not a valid position because the jury was not required to find Biase was involved but was authorized to find against petitioner and Cardarella on that Count upon a mere finding that they two conspired as it takes only two to make a conspiracy and the jury was so instructed (Tr. 465, 466).

Petitioner's right to be free of double or multiple punishments for one offense is beyond question. *Ex Parte Snow,* 120 U.S. 274, 7 S. Ct. 556, 31 L. Ed. 658; *Braverman* v. *United States,* 317 U.S. 49, 63 S. Ct. 99 and cases cited, *supra,* this Count.

Wherefore, having shown just cause for action, your petitioner prays for relief and respectfully moves the Court

for its order that the sentence pronounced by this Court against the defendant, now petitioner herein, of imprisonment for a period of five years to run concurrently on Counts I and II, and for five years on Count IV to run consecutively be hereby vacated and set aside as to all counts and petitioner discharged forthwith from imprisonment under said charges.

COUNT II

Motion for Correction or Reduction of Illegal Sentence under Rule 35, Federal Rules of Criminal Procedure. Title 18, U.S.C.A.

Comes now Felix Ferina, petitioner herein, and for his second count of his motion to vacate or correct illegal sentence invokes Rule 35, Federal Rules of Criminal Procedure, Title 18, U.S.C.A., for the correction or reduction of his sentences on Counts I, II and IV of the Indictment herein for the following reasons as shown by the files and transcripts and records of this Court and exhibits to this petition:

1. The procedure here being followed of bringing alternate motions, one under 28 U.S.C.A. Section 2255 and the other under Rule 35, Federal Rules of Criminal Procedure has been approved. *Redfield* v. *United States*, 9 Cir., 315 F.2d 76.

Resort to Rule 35, Federal Rules of Criminal Procedure for relief from double punishment for a single offense is approved procedure. *United States* v. *Crosby*, 2 Cir., 314 F.2d 654, 656; *Killebrew* v. *United States*, 5 Cir., 275 F.2d 308.

2. Relief under Rule 35, Federal Rules of Criminal Procedure may be inquired into and corrected even before movant begins serving his term under the sentence he com-

plains of. *Killebrew* v. *United States*, 5 Cir., 275 F.2d 308, 309 (3).

3. A Rule 35 proceeding is an appropriate remedy to determine whether the doctrine of merger of offenses precludes the imposition of sentence on multiple counts, *Redfield* v. *United States*, 9 Cir., 315 F.2d 76, 77.

4. Petitioner adopts paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of Count I of this Motion and incorporates it by reference at this point in Count II the same as if copied verbatim at this place.

5. In addition to the authorities cited under paragraph 10 of Count I of this Motion on the issue of double jeopardy arising out of several prosecutions and multiple punishments for one offense the following additional authorities are submitted:

In the case of *United States* v. *Miranti*, 2 Cir., 253 F.2d 135, the Court said (l.c. 138):

> "It is true that this court looks with displeasure on such 'double' prosecutions if conviction is accompanied by consecutive sentences, see United States v. Chiarella, 2 Cir., 184 F.2d 903, modified 2 Cir., 187 F.2d 12, vacated Chiarella v. United States, 341 U.S. 946, 71 S. Ct. 1004, 95 L. Ed. 1370; cf. United States v. Chiarella, 2 Cir., 214 F.2d 838, certiorari denied Chiarella v. United States, 348 U.S. 902, 75 S. Ct. 226, 99 L. Ed. 708."

In the case of *Petite* v. *United States*, 361 U.S. 529, 80 S. Ct. 450, 451, the Court vacated the judgment and remanded the case upon motion of the Solicitor General "that it is the general policy of the Federal Government 'that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated

by consideration both of fairness to defendants and of efficient and orderly law enforcement.'"

In a concurring opinion in that case, the Chief Justice said (l.c. 452):

> "Its representation with respect to future practice is given support by the Attorney General's memorandum to United States Attorneys which establishes a closely related policy against successive federal-state prosecutions; and the reasonableness of its request is demonstrated by the fact that this memorandum was issued after the prosecution, conviction, and judgment of the Court of Appeals in this case."

Mr. Justices Brennan, Black and Douglas agreed to the judgment but stated they would reverse on the ground of double jeopardy.

In the case of *United States* v. *Marakar*, 3 Cir., 300 F.2d 513, the Court held acquittal of a charge of conspiracy to import opium on the ground there was no proof of concert of action did not bar subsequent prosecution of the substantive offense of importing opium.

On petitions for writs of certiorari to the Supreme Court of the United States on motion of the Solicitor General and upon examination of the record, the judgments were vacated and defendant's order discharged. Mr. Justices Black, Douglas and Brennan joined in the disposition because they believed the Double Jeopardy *Clause of the Fifth Amendment* barred the prosecutions. *Marakar* v. *United States*, 370 U.S. 723, 82 S. Ct. 1573 (2). See to similar effect: *Saldana* v. *United States*, 365 U.S. 646, 81 S. Ct. 783; *Petite* v. *United States*, 361 U.S. 529, 80 S. Ct. 450. The core of the prosecutor's case on all counts was the alleged assault on Sheets with intent to kill. This was but one offense and the sentences herein constitute double

punishment for a single offense. *Sealfon* v. *United States,* 332 U.S. 575, 579-580, 68 S. Ct. 237, 240, quoted above in Count I.

See *Wilson* v. *United States,* 6 Cir., 286 F.2d 197, 198 (1) where the Court found the two counts constituted double jeopardy for the same offense.

The Supreme Court has frequently leveled criticism at the indiscriminate use of conspiracy indictments. *Kotteakos* v. *United States,* 328 U.S. 750, 772, 66 S. Ct. 1239, 90 L. Ed. 1557; *Krulewitch* v. *United States,* 336 U.S. 440, 69 S. Ct. 716, 83 L. Ed. 790; *Grunewald* v. *United States,* 353 U.S. 391, 77 S. Ct. 963, 1 L. Ed. 2d 931.

Here the charge in Counts I, II and IV of the Indictment were that petitioner and Cardarella acted knowingly and jointly in the attack on Sheets for the purpose of impeding him as a witness in Federal Court. This is a case where agreement of petitioner and Cardarella was necessary to the completion of the alleged substantive crime and there was in the evidence here no ingredient in the conspiracy which was not present in the alleged completed crime. Under such circumstances this case constitutes an exception to the class of cases where a conspiracy charge may properly be added to the substantive charge.

In the case of *Reno* v. *United States,* 5 Cir., 317 F.2d 499, the Court summed up the law on this question as follows (l.c. 503):

> "[5] The appellant relies on the principle stated in Pinkerton v. United States, 1946, 328 U.S. 640, 643, 66 S. Ct. 1180, 1182, 90 L. Ed. 1489:
>
> '* * * There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive

> crime and there is no ingredient in the conspiracy which is not present in the completed crime. See United States v. Katz, 271 U.S. 354, 355-356 [46 S. Ct. 513, 70 L. Ed. 986]; Gebardi v. United States, 287 U.S. 112, 121-122 [53 S. Ct. 35, 77 L. Ed. 206].' See also, United States v. Holte, 1915, 236 U.S. 140, 145, 35 S. Ct. 271, 59 L. Ed. 504; Lott v. United States, 5 Cir., 1955, 218 F.2d 675, 677; Pifer v. United States, 4 Cir., 1957, 245 F.2d 704, 705; 11 Am. Jur., Conspiracy, Sec. 20; Annotations 11 A.L.R. 196, 104 A.L.R. 1430."

The charge here was obstruction of justice by joint action of petitioner and Cardarella in attempting to influence, intimidate or impede a witness in a court of the United States. 18 U.S.C.A., Section 1503. This required the same proof of intent or knowledge that would be required to prove conspiracy to commit such an offense.

In the case of *United States* v. *Bufalino*, 2 Cir., 285 F.2d 408, the Court said (l.c. 415):

> "[2-4] The indictment charged a conspiracy to commit perjury and obstruct justice by giving false and evasive testimony. Evidence of the same intent or knowledge would be required to convict conspirators as to convict those charged with the substantive offense, Ingram v. United States, 1959, 360 U.S. 672, 677-678, 79 S. Ct. 1314, 3 L. Ed. 2d 1503; United States v. Ausmeier, 2 Cir., 1945, 152 F.2d 349."

The alleged joint action of petitioner and Cardarella could not have been committed without common knowledge, intent and cooperation. The substantive counts, therefore, are identical with the crime charged in the conspiracy and a mere duplication thereof.

In the case of *United States* v. *Zeuli*, 2 Cir., 137 F.2d 845, the Court in an opinion by L. Hand said (l.c. 846):

"[1, 2] Lower Federal courts have several times decided that, if a crime necessarily involves the mutual cooperation of two persons, and if they have in fact committed the crime, they may not be convicted of a conspiracy to commit it. United States v. Dietrich, C. C., 126 Fed. 644 (Van Devanter and Munger, JJ.): United States v. New York Central & H. R. R. Co., C. C., 146 Fed. 298 (Holt, D. J.): United States v. Sager, 2 Cir., 49 F.2d 725, 727, 728. Although the Supreme Court has never actually so decided, it has twice clearly approved the doctrine; and we accept it as settled law. United States v. Katz, 271 U.S. 354, 355, 46 S. Ct. 513, 70 L. Ed. 986; Gebardi v. United States, 287 U.S. 112, 122, 53 S. Ct. 35, 77 L. Ed. 206, 84 A.L.R. 370. Therefore, if the conspiracy was confined to the transaction between Zeuli and Steneck by which the stolen books were sold, although both were guilty of conspiracy."

In the case of *United States* v. *Center Veal & Beef Co.*, 2 Cir., 162 P.2d 766, the same Court explained this exception as follows (l.c. 770):

"What it does mean is that, when the, when the crime, which is the object of the putative conspiracy, requires for its commission some reciprocal action of the conspirators indict they may not be indicted for conspiring to commit it if they have in fact consummated it. This is because the crime presupposed their mutual agreement which was therefore a part of it."

The charge against petitioner here required reciprocal action of him and Cardarella as the evidence was all to the effect that Cardarella did the shooting and petitioner is alleged only to have been with him as an accomplice, aiding and abetting him.

In the case of *Pinkerton* v. *United States*, 5 Cir., 151 F.2d 499, the Court defined a criminal conspiracy in these words (l.c. 501):

"[6] 'A "conspiracy" is an agreement [or understanding] between two or more parties to do an unlawful thing, or to do a lawful thing in an unlawful manner.' Words and Phrases, Perm. Ed., Vol. 8, 'Conspiracy', page 718."

While Count IV of the Indictment here named Anthony J. Biase and Carlton A. Young as co-conspirators with petitioner and Cardarella, the Court discharged Young at the close of the State's case and there was no substantial evidence connecting Biase with petitioner and Cardarella (Tr. 304, 463-465). The jury was authorized to find petitioner and Cardarella guilty of conspiracy as charged even though the jury believed Biase was not in any way involved. The jury here was charged that two or more persons could be guilty of a criminal conspiracy (Tr. 465-466). This authorized the jury to find petitioner and Cardarella guilty on Count IV even though the jury might find Biase innocent on that Count.

In the case of *Pinkerton* v. *United States*, 328 U.S. 640, 643, 66 S. Ct. 1180, the Court said (l.c. 1182):

"There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. See United States v. Katz, 271 U.S. 354, 355, 356, 46 S. Ct. 513, 514, 70 L. Ed. 986; Gebardi v. United States, 287 U.S. 112, 121, 122, 53 S. Ct. 35, 37, 77 L. Ed. 206, 84 A.L.R. 370."

In the case of *United States* v. *Crosby*, 2 Cir., 314 F.2d 654, the Court stated the law as follows (l.c. 656):

"The claim is that the two sentences constitute double punishment for a single offense, a result prohibited by In re Snow, 120 U.S. 274, 7 S. Ct. 556, 30 L. Ed. 658

(1887), and many other cases. Since the objective was to correct 'an illegal *sentence*, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence,' Hill v. United States, 368 U.S. 424, 430, 82 S. Ct. 468, 472, 7 L. Ed. 2d 417 (1962), and since relief under F.R. Crim. Proc. 35, unlike 28 U.S.C., § 2255, is not dependent on a right to immediate release if the claim is established, compare Heflin v. United States, 358 U.S. 415, 420, 79 S. Ct. 451, 3 L. Ed. 2d 407 (1959) (concurring opinion of five justices), resort to Rule 35 was procedurally proper."

So far as petitioner and Cardarella are concerned the conspiracy charged in Count IV is identical with the crimes charged in the substantive Counts I and II and is a duplication and the sentence on Count IV constitutes double punishment for a single offense in violation of petitioner's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.

Wherefore, having shown just cause for action, your petitioner prays for relief and respectfully moves the Court for its order that the sentence pronounced by the Court against your petitioner for a period of five years on Count IV of the Indictment be hereby vacated and set aside.

Respectfully submitted,

/s/ Felix Ferina,
Petitioner.

/s/ Walter A. Raymond,

and

/s/ Kenneth C. West,
915 Grand Avenue,
Kansas City 6, Missouri,
Counsel for Petitioner

STATE OF KANSAS)
) SS.
COUNTY OF LEAVENWORTH)

Felix Ferina, of lawful age being duly sworn on his oath according to law, states that he is the petitioner named above; that he has read and fully understands the contents of both of the above motions, Counts I and II, and that the facts therein stated are true as he verily believes.

/s/ Felix Ferina.

AFFIDAVIT OF SERVICE

This is to certify that on this 7th day of April, 1964, three copies of the above Motion to Vacate or Correct Illegal Sentence were forwarded by me via first class mail, postage prepaid, to Honorable F. Russell Millin, United States Attorney, 453 United States Court House, Kansas City, Missouri, Attorney for Plaintiff.

Walter A. Raymond,
Attorney for Petitioner.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

FELIX FERINA,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. 14918-3

OPINION AND ORDER OVERRULING "MOTION TO VACATE OR CORRECT ILLEGAL SENTENCE UNDER TITLE 28, SECTION 2255, U.S.C.A."

(Filed April 29, 1964.)

The petitioner in this case has filed "Motion to Vacate or Correct Illegal Sentence under Title 28, Section 2255,

U.S.C.A." imposed upon him in the case of United States of America vs. Felix Ferina et al., No. 20732. Petitioner alternatively moves to correct or reduce sentence under Rule 35, F. R. Cr. P.

A motion filed pursuant to §2255 is a new proceeding, and the moving party becomes the petitioner. It is ordered that the record title of the motion be changed to Felix Ferina vs. United States of America, to conform to the legal requirements.

Petitioner is now confined in the United States Penitentiary at Leavenworth, Kansas, pursuant to conviction and two consecutive sentences of five years each imposed upon him for violation of §1503 and §371, Title 18, United States Code.

In December, 1960, Felix Ferina, petitioner, was tried and acquitted in the Circuit Court of Jackson County, Missouri, of the charge of felonious assault with intent to kill upon one Kenneth Bruce Sheetz.

On July 14, 1960, a Federal grand jury in the Western District of Missouri, returned an indictment in four counts against Felix Ferina, Anthony J. Cardarella, Anthony Biase and Carlton Young.

Count I charged that Ferina and Anthony Cardarella injured Kenneth Bruce Sheetz because of his having testified as a witness before a Nebraska Federal grand jury which returned a narcotics indictment against Biase.

Count II charged that Ferina and Cardarella attempted to intimidate Sheetz to prevent him from being a witness in the trial of one Anthony Biase to be held in Nebraska.

In Count III Carlton A. Young was charged with endeavoring to intimidate and influence Sheetz from being a witness in the same trial.

In Count IV Ferina, Cardarella, Biase and Young were charged with conspiring to injure Sheetz for his having testified as a witness before the Nebraska Federal Grand Jury and to intimidate him from being a witness at the impending trial of Biase.

§1503, Title 18, United States Code provides:

> "Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States Commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

§371, Title 18, United States Code provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any man-

ner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Upon trial in the Federal Court, a jury found defendants Ferina and Cardarella guilty as charged in Counts I, II and IV, and Biase guilty on Count I. Motion for Judgment of Acquittal was sustained by the court as to the defendant Young.

The court imposed a five year sentence upon defendants Ferina and Cardarella under Counts I and II, the terms to run concurrently, and an additional five year term was imposed upon defendants Ferina, Cardarella and Biase on Count IV to run consecutively to the sentence imposed upon Counts I and II. Upon appeal the sentences were affirmed as to Ferina and Cardarella and reversed as to Biase. *Ferina* v. *U. S.*, 302 F.2d 95, cert. den., sub nom., *Cardarella et al.* v. *U. S.*, 371 U.S. 819.

Petitioner's first contention for relief is that his acquittal in the State Court on the charge of assault with intent to kill barred his prosecution in the Federal Court. It is his contention that since the Federal prosecution was based on the same facts as the State prosecution. he was placed twice in jeopardy, contrary to the Fifth Amendment to the Constitution of the United States, and also that the doctrine of collateral estoppel is applicable. He cites the well known proposition that—

"where a question of fact essential to the judgment is actually litigated and determined by a valid and final

judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action." *Hoag* v. *New Jersey*, 356 U.S. 464, 471.

It is also his contention that the sentence was illegal in that separate consecutive sentences were imposed, one for the commission of the substantive act, and the other for conspiracy.

First, we will discuss the question of double jeopardy. The court does not have before it (and did not at the trial of the case), the testimony adduced at the trial of the petitioner in the State Court. However, it may be assumed that the evidence in the prosecution in the State Court for assault with intent to kill, and the case in the Federal Court were substantially the same. The question of double jeopardy in such instance has been conclusively determined by the United States Supreme Court. In *U. S.* v. *Lanza*, 260 U.S. 377, the Court stated:

> "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interference with the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the Amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignity, not that of the other.
>
> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the Federal Government, Barron v. Baltimore, 7 Pet. 243, and the double jeopardy therein Baltimore, 7 Pet. 253, and the double jeopardy therein forbidden is a second prosecution under the authority of the Federal Government after a first trial for the

same offense under the same authority. * * *" 260 U.S. 382.

To the same effect see *Abbate* v. *U. S.*, 359 U.S. 187, wherein the above is quoted.

Petitioner cites and discusses at some length the dissenting opinion in the *Abbate* case, but this court is clearly bound by the majority opinion, even if this court would be inclined to agree with the minority, which we do not, in view of the long line of authority to the contrary.

That issue must therefore be determined against the petitioner.

With respect to the contention that the substantive charge against him was not proved, petitioner states:

> "Here the petitioner was acquitted of the substantive charge in the State Court which should preclude this subsequent prosecution for conspiring to commit an act it has already been adjudicated he did not do."

Further:

> "The substantive offense of assault on Sheets with intent to kill was the overt act relied upon to support the conviction on the charge of conspiracy. The acquittal in the State Court determined no such overt act was committed necessarily operated as an acquittal of the conspiracy charge."

The petitioner further alleges that since all the evidence was to the effect that Cardarella did the actual shooting, and that petitioner was merely present, he could *only* have acted jointly, and thus could only be guilty of one offense. *U. S.* v. *Katz*, 271 U.S. 354.

The evidence upon which the petitioner was convicted in this court shows that petitioner did participate in the commission of the overt act, i.e., the shooting of Sheetz, within the meaning of the law, and the jury so found. There was sufficient evidence upon which to base the conspiracy charge and conviction, as well as the charge and conviction of the substantive offense. In *Pinkerton* v. *U. S.*, 328 U.S. 640, the court stated:

> "It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established . . . A conviction for the conspiracy may be had though the substantive offense was completed. . . . And the plea of double jeopardy is no defense to a conviction for both offenses."

The matter was again before the Supreme Court in *Callanan* v. *U. S.*, 364 U.S. 587. In that case consecutive sentences for conspiracy to obstruct commerce by extortion and for the substantive offense of obstructing commerce by extortion, were approved.

The doctrines of collateral estoppel and res judicata are not applicable because the same parties, i.e., State and Federal governments, were not involved in the two trials.

For the reasons aforesaid, the Petitioner's "Motion to Vacate or Correct Illegal Sentence under Title 28, Section 2255, U.S.C.A." and "Motion to Correct or Reduce Sentence under Rule 35 F. R. Crim. P. are overruled.

/s/ R. M. Duncan

Dated: April 29, 1964

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 17,685

Felix Ferina, Appellant,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Western District of Missouri.

[January 28, 1965.]

Before VOGEL, VAN OOSTERHOUT and MEHAFFY, Circuit Judges.

MEHAFFY, Circuit Judge.

Petitioner appeals an order of the United States District Court for the Western District of Missouri denying his alternative motion under 28 U.S.C.A. § 2255 and Fed. R. Crim. P. 35 to vacate or correct illegal sentences.

Petitioner was convicted by a jury under an indictment which charged him in Counts I and II with obstructing justice in violation of 18 U.S.C.A. § 1503 by shooting with a revolver a Government witness because he had testified before a federal grand jury and, by the same assault, at-

tempting to intimidate and prevent this witness from testifying at the trial in a subsequent federal criminal prosecution. In Count IV, he was charged with a conspiracy to obstruct justice in violation of 18 U.S.C.A. § 371.

For each substantive offense under Counts I and II, petitioner received a five year sentence, ordered to run concurrently. On Count IV, petitioner was sentenced to an additional five year term to run consecutively with the sentences imposed under Counts I and II.

Subsequently, petitioner moved for a judgment of acquittal, an arrest of judgment, or in the alternative, for a new trial. He contended primarily that a former judgment of acquittal on an aggravated assault charge in the State Court of Missouri was res judicata and that his retrial in federal court for the same offense constituted double jeopardy in contravention of his rights under the Fifth Amendment to the United States Constitution. The trial court denied the motion. Petitioner appealed his judgment of conviction of this Court seeking reversal on grounds of insufficiency of the evidence, prejudicial statements by the prosecution in its closing arguments to the jury, and newly discovered evidence. He did not renew the alleged defenses of res judicata or double jeopardy. We affirmed petitioner's conviction. *Ferina* v. *United States*, 302 F.2d 95 (8th Cir. 1962), cert. denied sub nom. *Cardarella* v. *United States*, 371 U.S. 819 (1963). Our opinion elaborately sets forth the facts which resulted in the convictions.

Petitioner now collaterally attacks the judgment of conviction and sentences imposed for the following reasons:

(1) The state and federal prosecutions placed petitioner twice in jeopardy for a single offense in violation of the Fifth and Fourteenth Amendments;

(2) The judgment of acquittal in the state court prosecution dominated by federal authorities collaterally estops or bars the Government under the doctrine of res judicata from relitigating in federal court all facts and issues previously decided against the Government and in petitioner's favor; and

(3) Petitioner received illegal sentences inflicting double punishment for a single offense as a result of a duplicitous indictment.

Constitutional immunity from double jeopardy is a personal right which if not affirmatively pleaded by the defendant at the time of trial will be regarded as waived. *Kistner* v. *United States*, 332 F.2d 978 (8th Cir. 1964); *Harris* v. *United States*, 237 F.2d 274 (8th Cir. 1956); *Barker* v. *State of Ohio*, 328 F.2d 582 (6th Cir. 1964). This waiver may be an expressed, voluntary relinquishment of the right by plea of guilty; *United States* v. *Hoyland*, 264 F.2d 346 (7th Cir. 1959), cert. denied 361 U.S. 845 (1959), reh. denied 361 U.S. 904 (1959); or deemed impliedly waived where, as here, the petitioner pleaded not guilty and proceeded to trial, verdict, and judgment without raising the defense until his post-trial motions. *Brady* v. *United States*, 24 F.2d 399 (8th Cir. 1928).

Nevertheless, we would be compelled on the merits to hold that the defense of double jeopardy is unavailing to petitioner under the circumstances and existent law. Petitioner was not prosecuted twice for the same offense before tribunals deriving their authority from the same sovereign. He was prosecuted and acquitted in the State Court of Missouri under its penal code for the felonious

assault with a loaded pistol with the intent to kill. His indictment and conviction in federal court were for obstructing and conspiring to obstruct justice by injuring a Government witness in another federal prosecution in violation of 18 U.S.C.A. § 1503 and 18 U.S.C.A. § 371, respectively.

The plea of double jeopardy is not only inappropriately raised where, as in the instant case, there is a lack of identity between the two offenses due to the dissimilarity in the elements of proof, *Kistner* v. *United States, supra,* but also is improvidently asserted even if given identical offenses, their proscription emanates from different sovereigns. *Abbate* v. *United States,* 359 U.S. 187 (1959); *Bartkus* v. *Illinois,* 359 U.S. 121 (1959), reh. denied 360 U.S. 907 (1959); *United States* v. *Lanza,* 260 U.S. 377 (1922).

Counsel for petitioner urges that we take the initiative and hold contrary to the majority opinions in these decisions because subsequent changes in personnel on the bench of the Supreme Court have resulted in a realignment of majority opinion now favoring the dissenter's argument that the Fifth Amendment prohibition against double jeopardy was "intended to establish a broad national policy against federal courts trying or punishing a man a second time after acquittal or conviction in any court." Dissenting opinion of Mr. Justice Black, *Abbate* v. *United States, supra* at 203.

This Court does not forecast the law of the Supreme Court when and if it should decide to reverse itself on the issues raised here. We are obliged to rigorously apply the prevailing, majority precedent.

Corresponding to its double jeopardy plea, petitioner submits that the correlative principles of res judicata and

collateral estoppel bar the Government from retrying him for the alleged assault in a federal forum after he has been adjudged innocent in the state action to which the federal authorities by their intervention became a party. Petitioner takes the position that the federal government was in privity with the state as a result of its close cooperation in compiling and presenting the evidence in the state prosecution. Therefore, petitioner concludes the federal government became bound by the state judgment of acquittal.

The doctrines of res judicata and collateral estoppel in criminal cases require that, to bar the litigation of an issue, the same issue must have been determined favorably to the accused, expressly or by necessary implication, in a prior adjudication between the *same parties*. See *e.g.*, *Hoag* v. *New Jersey*, 356 U.S. 464, 470-71 (1958), reh. denied 357 U.S. 933 (1958); *United States* v. *Kramer*, 289 F.2d 909, 913 (2nd Cir. 1961).

We need not dwell on the applicability of either doctrine or the ramifications of each, because we are convinced petitioner's contention that the Government was a "party" to the state action is not well taken. Mere use in the state proceedings of the fruits of the mutual investigations by the Federal Bureau of Narcotics and Federal Bureau of Investigation, without more, does not infect the separate sovereignty of that prosecution, nor bind the federal government in any manner to the issues so resolved by the state judgment.

In his motion under Rule 35 to correct the alleged illegal sentence imposed for conviction of conspiracy on Count IV, petitioner does not attack the general rule in our law that one may be convicted and receive cumulative punishment for both the substantive statutory offense of

obstructing justice under 18 U.S.C.A. § 1503 and conspiring to commit this federal crime under 28 U.S.C.A. § 371, the general conspiracy statute. The theory is that conspiracies to violate a penal law should be independently punishable because of the increased danger to society involved in group offenses. See *Pinkerton* v. *United States*, 328 U.S. 640 (1946), reh. denied 329 U.S. 818 (1946).

Petitioner argues that his multi-count indictment falls within a recognized exception forbidding a conspiracy charge to be added to a substantive charge when it is shown that agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. The logic and justice underlying the exception prevent an accused from receiving double punishment for what is in actuality but one offense.

But where there is a lack of identity of offenses, as here, the narrow exceptions to the general rule are not applicable. Justice Douglas made this quite clear in *Pinkerton*, supra at 643-44, with the following authoritative observations:

> "It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established. *Clune* v. *United States*, 159 U.S. 590, 594-595. A conviction for the conspiracy may be had though the substantive offense was completed. See *Heike* v. *United States*, 227 U.S. 131, 144. And the plea of double jeopardy is no defense to a conviction for both offenses. *Carter* v. *McClaughry*, 183 U.S. 365, 395. It is only an identity of offenses which is fatal. See *Gavieres* v. *United States*, 220 U.S. 338, 342. Cf. *Freeman* v. *United States*, 146 F.2d 978. A con-

spiracy is a partnership in crime. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 253. It has ingredients, as well as implications, distinct from the completion of the unlawful project.

* * * * * * *

"Moreover, it is not material that overt acts charged in the conspiracy counts were also charged and proved as substantive offenses. As stated in *Sneed* v. *United States, supra,* p. 913 [*Sneed* v. *United States,* 298 F. 911), 'If the overt act be the offense which was the object of the conspiracy, and is also punished, there is not a double punishment of it.' The agreement to do an unlawful act is even then distinct from the doing of the act."

One of the best illustrations of a substantive offense merging in the conspiracy so as to invoke the asserted exception to the general rule is found in *United States* v. *Dietrich,* 126 Fed. 664 (8th Cir. 1904). In that case a United States Senator and an alleged co-conspirator were indicted under the former general conspiracy statute for conspiring to violate a federal law making it a crime for the congressman to agree to receive a bribe for aiding and procuring a governmental appointment for the latter. The court reasoned that because the statute the parties allegedly conspired to violate made substantive offenses of the acts of receiving or giving, as well as agreeing to receive or give, a bribe, concerted activity by a plurality of agents was essential to conception of the crime. Therefore, since all elements for commission of the substantive crime including agreement of the two offenders would be duplicated in any proof of their conspiracy to commit these concerted overt acts, absent other concerted activity or plurality of agents, the defendants' demurrer to the conspiracy charge would have to be sustained. See also *e.g.*, *United States* v. *Katz,* 271 U.S. 354, 355 (1926).

Petitioner contends that he and one Anthony Cardarella were charged in Counts I and II with having jointly attacked the Government witness in violation of the obstruction of justice statute. He maintains that this allegation of joint action necessitated that the Government prove an implicit agreement between the two perpetrators in order to sustain a conviction for the substantive offenses. He further submits that proof of this same agreement, together with the other common elements of intent and knowledge, were essential to the conviction for conspiracy which was therefore nothing more than a duplication of charges.

As observed in *United States* v. *Center Veal & Beef Co.*, 162 F.2d 766, 770 (2nd Cir. 1947), petitioner's reasoning misconceives the merger doctrine which comes into play only when agreement of two persons is *necessary* for completion of the substantive crime:

> "(W)hen the crime, which is the object of the putative conspiracy, requires for its commission some reciprocal action of the conspirators indicted, they may not be indicted for conspiring to commit it if they have in fact consummated it. This is because the crime presupposed their mutual agreement which was therefore a part of it."

While the proof adduced at trial may well indicate that petitioner and Cardarella, his co-offender and conspirator, acted jointly in committing a single assault upon their victim, neither concerted action nor agreement was fundamental to proof of their separate violation of the substantive crime of obstructing justice. Reciprocal action was not the essence of the crime.

For example, had petitioner and Cardarella offered the witness a bribe which he agreed to accept, there would be

some authority for finding merger with the separate charge of conspiracy. Such an argument was advanced against an accused's being charged separately with both impeding justice by bribery of a juror and conspiracy to commit the offense in *Slade* v. *United States*, 85 F.2d 786 (10th Cir. 1936). Recognizing the teachings of *Dietrich*, *supra*, that concerted action was necessary to the offense of bribery so as to preclude the added charge of conspiracy, the court ruled that under the circumstances this defense to the separate charge of conspiracy was inapplicable. The court logically reasoned that the substantive offense was not bribery but influencing a juror and impeding justice, and the persons to be influenced, the jurors, were not parties to the conspiracy.

The analogy is apparent but need hardly be drawn with the instant case. The petitioner committed the similar offense of impeding justice by assault upon a Government witness who obviously did not agree to his own injury. Thus, the charges for both commission of the offense and conspiracy were not duplicitous but well founded.

The order denying the relief appealed from is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 17,685. September Term, 1964.

Felix Ferina, Appellant.

vs.

United States of America.

Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be heard on the original files of the United States District Court for the Western District of Missouri; the briefs filed by the respective parties, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court appealed from denying Motion to vacate or correct illegal sentences in this cause be, and the same is hereby, affirmed.

January 28, 1965.

Order entered in accordance with Opinion:

/s/ Robert C. Tucker,

Clerk, U. S. Court of Appeals for the Eighth Circuit.

INFORMATION IN LIEU OF INDICTMENT

Information

STATE OF MISSOURI

vs.

FELIX FERINA

In the Circuit Court of Jackson County, Missouri, at Kansas City, November Term, 1960 In Division Number 4 thereof, designated by the rules of said Court as Criminal Division A.

Now comes Lawrence Gepford, Assistant Prosecuting Attorney for the State of Missouri, in and for the body of the County of Jackson, and upon his oath informs the Court, that Felix Ferina whose Christian name in full is unknown to said Assistant Prosecuting Attorney, late of the county aforesaid, on the 13th day of November, 1946, at the County of Jackson, State of Missouri, was convicted of a felony, to-wit: Burglary 2nd Degree and was sentenced therefor to serve 2 years at the Missouri Intermediate Reformatory at Algoa, that thereafter he was paroled by the board of parole at Jackson County, Missouri, at Kansas City, that thereafter Felix Ferina at the County of Jackson and State of Missouri, on the 20th day of June, 1960, did then and there in and upon one Kenneth Sheetz, feloniously, wilfully, on purpose and of his malice aforethought, make an assault, and the said Felix Ferina with a certain weapon, to-wit: a pistol loaded with gunpowder and leaden balls, then and there feloniously, wilfully, on purpose and of his malice aforethought, did shoot off, at, against and upon the said Kenneth Sheetz, then and there giving to the said Kenneth Sheetz, in and upon the head and body of the said Kenneth Sheetz with a pistol aforesaid, a wound, with the feloniously

intent then and there him the said Kenneth Sheetz feloniously, wilfully, on purpose and of his malice aforethought to kill and slay, as against the peace and dignity of the State.

.....
Assistant Prosecuting Attorney.

STATE OF MISSOURI,)
) ss.
County of Jackson,)

Lawrence Gepford, Assistant Prosecuting Attorney in and for Jackson County, Missouri, makes oath and says that the facts set forth in the foregoing information are true, according to his best information and belief.

.....
Assistant Prosecuting Attorney.

Subscribed and sworn to before me this 14th day of November, 1960.

John J. McFadden
Clerk of the Circuit Court,
Criminal Division, of Jackson
County, Missouri.

By ..... Deputy.